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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1435

MAHONING WOMEN'S CENTER,

Petitioner,

v.

JACK C. HUNTER, Mayor and President of the Board of Health; DONALD BAKER, Chief of Police; RICHARD HUGHEY, HERMAN "PETE" STARKS, PATRICK J. UNGARO, ROBERT G. SPENCER, LEONARD J. YURCHO, MICHAEL J. CROGAN, and JOHN T. MURPHY, City Council Members; DR. SAMUEL GOLDBERG, DOUGLAS K. EVERETT, WARREN HARRELL, JR., MRS. DORIS RINKOV, and MRS. JOYCE KESTER, Board of Health Members,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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JACK C. HUNTER, Mayor and President of the Board of Health; DONALD BAKER, Chief of Police; RICHARD HUGHEY, HERMAN "PETE" STARKS, PATRICK J. UNGARO, ROBERT G. SPENCER, LEONARD J. YURCHO, MICHAEL J. CROGAN, and JOHN T. MURPHY, City Council Members; DR. SAMUEL GOLDBERG, DOUGLAS K. EVERETT, WARREN HARRELL, JR., MRS. DORIS RINKOV, and MRS. JOYCE KESTER, Board of Health Members,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Mahoning Women's Center [the "Center"] respectfully petitions this Court for a writ of certiorari to review the December 18, 1979, final judgment of the court of appeals denying litigation costs and counsel fees in a 42 U.S.C. § 1983 action where the Center prevailed fully on the merits.

OPINIONS BELOW

The December 18, 1979, opinion of the United States Court of Appeals for the Sixth Circuit has been reported at 610 F.2d 456. A copy is included in the Appendix at 1a-10a.

The September 14, 1977, order of the United States District Court for the Northern District of Ohio, denying attorneys' fees, has not been reported. A copy appears in the Appendix at 11a-12a.

The May 25, 1977, opinion of the District Court on the merits is officially reported at 444 F. Supp. 12 (N.D. Ohio 1977). A copy is set out in the Appendix at 13a-24a.

No other orders are relevant to this Petition and none have been included.

JURISDICTION

(i) The United States Court of Appeals filed its judgment and opinion on December 18, 1979.

(ii) Petitioners sought no rehearing, and made no requests for additional time to file this petition.

(iii) Petitioners invoke the certiorari jurisdiction of this Court under 28 U.S.C. § 1254(1) to review the important federal questions presented. Cases supporting jurisdiction include: *Hutto v. Finney*, 437 U.S. 678 (1978); *Northcross v. Board of Education*, 412 U.S. 427 (1973) (per curiam); *Newman v. Piggie Park*, 390 U.S. 400 (1968).

QUESTIONS PRESENTED

I. Whether a civil rights plaintiff who successfully challenges a city ordinance unconstitutionally restricting first trimester abortion facilities may ordinarily recover litigation costs under 42 U.S.C. § 1988 in the absence of "special circumstances" that would render such an award unjust?

II. Whether the Court of Appeals applied an erroneous legal standard and abused its discretion by not requiring a finding of "special circumstances" that would render a § 1988 award unjust?

III. Whether the decisions below erroneously denied § 1988 litigation costs where the only two grounds recited were (1) a contested finding of good faith, and (2) an assumption outside the record that plaintiff had the ability to pay legal fees in challenging unconstitutional ordinances passed by the City?

STATEMENT OF THE CASE

Petitioner Mahoning Women's Center, Inc. [hereinafter the "Center"], is an Ohio corporation. In early October, 1976, the Center proposed to open a low cost medical facility in Youngstown, Ohio. Physicians at the Center were to offer various gynecological services, including first trimester abortions.

No hospital, clinic, or other facility in Youngstown offered first trimester abortion services at that time.

The Court of Appeals made the following uncontested recitations about the facts:

1. "Shortly after" the Center leased office space, the Youngstown City Council enacted an abortion-specific ordinance entitled "ABORTIONS" which applied, as no one

denied, solely to petitioner. Revised Code, c. 98, App. at 2a. This city ordinance was an "extra layer" on top of state licensing of physicians and regulation of abortion services.

2. The ordinance on "ABORTIONS" "singled out for extensive regulation only medical clinics performing abortions." It was *abortion-unique.* The ordinance included "individual physicians' offices" and "prohibit[ed] operation of a non-hospital abortion service without a license issued by the Board of Health of the City of Youngstown." App. at 2a.

3. Some of the numerous and abortion-unique restrictions "effectively require[d] that all first trimester abortions be performed in facilities that are the functional equivalent of a hospital." App. at 3a.

4. The Center "applied for and was denied a license for its facilities." App. at 4a.

This litigation followed. The Center questioned Youngstown's good faith on a number of grounds. The least of these was intentional noncompliance with decisions by this Supreme Court. *Sendak v. Arnold,* 429 U.S. 968 (1976) (per curiam), *aff'g* 416 F. Supp. 22 (S.D. Ind.) (three-judge court); *Doe v. Bolton,* 410 U.S. 179, 193-95 (1973); *Roe v. Wade,* 410 U.S. 113, 164 (1973).

The Center based its claims for relief upon 42 U.S.C. § 1983, and properly alleged violations of the due process and equal protection clauses of the Fourteenth Amendment, including "the fundamental right of women to decide whether to bear a child." App. at 4a. *Cf. Eisenstadt v. Baird,* 405 U.S. 438, 453 (1972). The Center specifically alleged 28 U.S.C. § 1331, 1343 jurisdiction.

There were motions, discovery proceedings, some delays, and finally a decision on May 25, 1977, invalidating the Youngstown ordinance on "ABORTIONS." That May, 1977, decision appears in the Appendix at 13a-24a. It is officially reported at 444 F. Supp. 12. The result on the merits is not contested by these petitioners.

The Center representatives then reviewed the legislative history and case law on the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988. Since the Center had been closed for almost eight months as a consequence of the Youngstown City Council's illegal actions, and delay by the district court, a recovery of litigation costs appeared reasonable. The Center accordingly moved for an award under 42 U.S.C. § 1988.

Almost four months later, the district court on September 14, 1977, flatly denied a § 1988 reimbursement. App. at 11a. In a one-page order, which has no citations to the legislative history or case law, the district court grounded its decision on one covert and two overt justifications:

1. First, the district court found that "defendants acted in good faith . . . [which] mitigates against the award of attorney fees in this case." App. at 12a. Neither case law nor legislative history could be cited to support that view, and no citations were attempted. Both are explicitly contrary.

2. Second, the district court reasoned, "plaintiff is not indigent, but rather is a corporation for profit entirely capable of bearing the cost . . . ." App. at 12a. This conclusion had no basis in the record. No evidence whatever had been introduced on the financial status, if any, of the Center. Indeed, the district court should have been aware that the Center had been delayed in its opening some eight months. Surely the district court

could not presume that small businesses budget tens of thousands of dollars in case city councils precipitously enact unconstitutional ordinances. Until late October, 1976, at least, the Center should have been able to presume that the City would not attempt to engage in first trimester facility regulation.

3. A third feature of the district court's order denying attorneys' fees was covert. Rather than exercising the limited discretion described by Congress and this Court, the district court adopted its own view of discretion. It denied litigation costs on the basis of the two factors already mentioned. No effort was made to apply the standard of *Newman v. Piggie Park*, 390 U.S. 400, 402 (1968), for awarding fees unless "special circumstances" would render such an award "unjust."

The Center appealed to the Sixth Circuit from this one-page repudiation of the Supreme Court and Congress. Youngstown *et al.* appealed on the merits. The decision on the merits was affirmed in a comprehensive opinion. However, the Sixth Circuit, in footnote 11, upheld the denial of litigation costs and fees under 42 U.S.C. § 1988. Footnote 11 is the subject of this Petition. Without any reference to decisions by this Court, legislative history, or other appellate determinations, it very simply states:

> "[T]he District Court did not abuse the 'discretion' expressly vested in it by 42 U.S.C. § 1988 (1976). In ruling upon requests for the award of attorneys fees, the District Court may consider the nature of the question presented, the good faith of the parties, the means of the plaintiff and the quality and extent of the legal services rendered." 610 F.2d at 461 n.11; App. at 10a.

Footnote 11 magnifies the abuse of discretion by the district court. It adds vague factors not previously considered, applies an improper legal standard, ignores applicable decisions from this Court, and disregards a carefully developed legislative process and history. It also creates a serious conflict among the circuits.

The Center has accordingly prepared this Petition to urge review of a clearly erroneous decision below.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed by this Court for three reasons. It is directly contrary to other decisions by the U.S. Courts of Appeal for the First, Fourth, Fifth, and Eighth Circuits. It is also contrary to express determinations in the legislative history of the Act. 42 U.S.C. § 1988 (1976). Finally, the decisional approach is inconsistent with that adopted by this Court in analogous attorney fees cases. *E.g., Northcross v. Board of Education*, 412 U.S. 427 (1973) (per curiam).

I.

THE PETITION RAISES IMPORTANT, RECURRING QUESTIONS CONCERNING INTERPRETATION OF THE CIVIL RIGHTS ATTORNEYS' FEES AWARDS ACT OF 1976, 42 U.S.C. § 1988, WHICH SHOULD BE SETTLED BY THIS COURT.

The decision by the Sixth Circuit denying fees raises three particular issues which are addressed in the legislative history and have recurred on numerous occasions in the lower courts. These are sufficiently important and substantial to warrant review here.

A. Scope of Discretion

The first major issue is the scope of discretion to be exercised when awarding § 1988 fees to a "prevailing party" under the Act. That determination can dictate the outcome. A wide range exists between awarding fees in all but extraordinary cases, on the one hand, and limiting fees to cases of indigent plaintiffs who prevail completely against wealthy defendants whose bad faith is proven clearly and convincingly, at the other extreme.

The Sixth Circuit adopted a more restrictive standard of discretion in its footnote 11 than that suggested by the legislative history. The lower court upheld a disallowance of fees where the prevailing plaintiff was organized as a business corporation, and the defendants purportedly acted in good faith. App. at 10a.

Both the Senate[1] and the House[2] reports are at odds with the Sixth Circuit approach. Each report states as an intended standard for discretion that adopted by this Court in *Newman v. Piggie Park,* 390 U.S. 400, 402 (1968), and *Northcross v. Board of Education,* 412 U.S. 427 (1973) (per curiam). *See* Senate Report at 4; House Report at 6, 8, 9.

This inconsistency between the Sixth Circuit and Congress suggests that the opinion below has undermined an important national legislative priority.

B. "Good Faith" as a Defense

A second major issue raised by the decision below is the injection of "good faith"[3] as a partial or total defense

[1] S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976) [hereinafter "Senate Report"].

[2] H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. (1976) [hereinafter "House Report"].

[3] "Good faith" was one of two factors relied on both by the District Court and the Court of Appeals. App. at 10a, 12a.

to a § 1988 fee award. Again, both the Senate and the House rejected this factor as a defense and defeated amendments offered to include it. *See* 122 Cong. Rec. S16433-34 (daily ed. Sept. 22, 1976) (amendment of Senator Helms defeated); 122 Cong. Rec. S16567, 16657 (daily ed. Sept. 24, 1976) (amendment of Senator Allen defeated); see also Senate Report at 4-5; House Report at 2 n.1, 7-9; 122 Cong. Rec. H12156, H12160 (daily ed. Oct. 1, 1976).

The resurrection of good faith by the Sixth Circuit as a defense to a § 1988 claim further suggests that the Act is being undermined by that court.

C. Means of the Plaintiff

A third and final issue arising from the decision below is the disallowance of fees based upon unwarranted assumptions about "the means of the plaintiff . . . ." App. at 10a, 12a.

The assumption of the lower courts was that any business corporation can routinely afford substantial counsel fees in this type of case. No facts, no law, and no analysis support this hypothesis. Moreover, the Mahoning Women's Center was a new small business corporation. It was thwarted from opening for almost eight months while the District Court deliberated. The Center obviously had no income during that time and never did recover any of its losses caused by Youngstown and its officials. A more logical assumption would be that the Center was almost forced out of business and into bankruptcy by the delay. National statistics show, for example, that 202,951 bankruptcy proceedings were commenced during the twelve-month period ending June 30, 1978. *Annual Report for 1979, Director of the Administrative Office of United States Courts,* at

A-114, Table F-1 (prelim. draft 1980). The courts below erred not only in weighing this factor heavily, but in doing so on the basis of stereotype rather than fact.

The legislative history and the statutory language make no suggestion that businesses organized ostensibly for profit should have no recovery under 42 U.S.C. § 1988. The Act itself says "prevailing party," not prevailing middle income, non-profit, or indigent party. Moreover, the statutory purpose applies to all types of plaintiffs. As the Senate Report indicates,

> "fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain . . . . [C]itizens must have the opportunity to recover what it costs them to vindicate these rights in court." Senate Report at 2.

No other Act reduces counsel fees or damages on the basis of presumed financial status of the prevailing party. Not one of the "more than 50 laws"[4] which authorize fee shifting has been restricted in the unusual manner suggested by the Sixth Circuit.

The *implications* of investigating the financial status of prevailing parties who seek § 1988 relief are enormous. What size business, what investment, what profit margin, what net income, what size contingent litigation fund, if any, will disqualify a plaintiff from § 1988 recovery? A § 1988 proceeding could become a multiple tax audit of any corporate plaintiff that prevails in a § 1983 action. No such inquiry was remotely contemplated by Congress. Such a conclusion would be unheard of in a fee application hearing under the antitrust laws, yet those laws

[4] Senate Report at 2.

enforce commercial legal rights of a non-constitutional dimension.

D. Uniformity of Federal Fee Legislation

One purpose of the 1976 Act, as stated by the Senate, was "to achieve consistency in our civil rights laws." Senate Report at 1. The Act "follows the language of Titles II and VII of the Civil Rights Act of 1964 . . . and section 402 of the Voting Rights Act Amendments of 1975 . . . ." *Id.* at 2. As the Senate Report emphasized more than once:[5]

> "It is intended that the amount of fees awarded under [the Act] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases . . . ." Senate Report at 6.

The Sixth Circuit decision departs in a serious way from long lines of precedent and pages of carefully considered legislative history. It undermines the intent of Congress in an area of law that is being heavily litigated.

The questions raised here are sufficiently important and recurring. This Court should grant the petition for certiorari on that ground, in addition to those which follow.

[5] See also Senate Report at 4:

"It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act."

II.

A SERIOUS CONFLICT OF CIRCUITS ON INTERPRETATION OF THE CIVIL RIGHTS ATTORNEYS' FEES AWARDS ACT OF 1976, 42 U.S.C. § 1988 IS CREATED BY THE DECISION BELOW.

Not only is the Sixth Circuit decision an incorrect determination of an important, recurring question, but it creates a serious conflict of circuits. This can be illustrated briefly by considering how each of several circuits has dealt with the three underlying questions presented here.

First Circuit: The first and Sixth Circuits appear to be divided on two and arguably three of the major points disputed here.

Scope of Discretion: *Perez v. University of Puerto Rico,* 600 F.2d 1-2 (1st Cir. 1979), holds that "... under 42 U.S.C. § 1988 fees should normally be awarded to prevailing plaintiffs in civil rights cases . . . ." A lower court finding of "special circumstances" was there reversed. *Accord, Sargeant v. Sharp,* 579 F.2d 645 (1st Cir. 1978). The Sixth Circuit opinion below does not construe § 1988 in such a fully remedial way. App. at 10a.

Good Faith of Government Defendant: The First Circuit addressed this aspect of § 1988 at length in *Nadeau v. Helgemoe,* 581 F.2d 275 (1st Cir. 1978). There the appeals court observed: "[T]he good faith of defendants is not a controlling factor . . . ." *Id.* at 280. By contrast, the Sixth Circuit accords substantial weight to that factor. App. at 10a.

Presumed Ability of Corporate Plaintiff to Pay: While this precise issue has not been addressed by the First Circuit, a similar point has been decided. Where fees

are absorbed by funded legal service groups, those "organizations may recover fees under the Civil Rights Attorneys' Fees Award Act of 1976 . . . ." *Lund v. Affleck,* 587 F.2d 75, 76 (1st Cir. 1978). *Accord, Reynolds v. Coomey,* 567 F.2d 1166, 1167 (1st Cir. 1978). The Sixth Circuit, by contrast, forced Mahoning Women's Center to "absorb" its legal fees without any proof of financial ability to do so. This is a conflict in principle, if not in precise holding. Similarly, the First Circuit applies to § 1988 matters "... 'the same standards which prevail in other types of equally complex Federal litigation such as anti-trust cases.'" *King v. Greenblatt,* 560 F.2d 1024, 1026 (1st Cir. 1977), citing Senate Report at 6. The Sixth Circuit has not been uniform in that respect.

Fourth Circuit: The Fourth and Sixth Circuits are in disagreement on two of the three principal issues presented here.

Discretion: The Fourth Circuit pointedly holds that the scope of discretion on a § 1988 application is "narrowly limited" by the legislative history and case law. *Bonnes v. Long,* 599 F.2d 1316, 1318 (4th Cir. 1979). The *Bonnes* court adopted the standard from *Newman v. Piggie Park, supra* and relied on both the Senate and House reports. A conflict exists with the Sixth Circuit decision below which did not cite any authority and expanded the scope of discretion to deny fees. App. at 10a.

Good Faith: *Chastang v. Flynn & Emrich,* 541 F.2d 1040 (4th Cir. 1976), holds that in analogous fee cases a "'Company's good faith alone would not insulate it from making plaintiffs whole.'" *Id.* at 1045. This approach is consistent with the legislative history, but in conflict with the Sixth Circuit. App. at 10a.

Fifth Circuit: The Fifth and Sixth Circuits are in conflict on all three points raised by this petitioner.

Discretion: *Concerned Democrats v. Reno,* 601 F.2d 891, 892 (5th Cir. 1979) (per curiam), recognizes as "settled law" that "prevailing parties as plaintiff should ordinarily recover attorney's fees unless special circumstances would render an award of them unjust." *Accord, Johnson v. Mississippi,* 606 F.2d 635, 636 (5th Cir. 1979); *Criterion Club v. Board of Comm'rs,* 594 F.2d 118, 120 (5th Cir. 1979). The Sixth Circuit opinion below is contra. App. at 10a.

Good Faith: *Johnson v. Mississippi,* 606 F.2d 635, 637 (5th Cir. 1979), holds that a "[d]efendants' 'good faith' belief that the statute was valid is not controlling" on a § 1988 application. *Accord, Brown v. Culpepper,* 559 F.2d 274, 278 (5th Cir. 1977). Again, the Sixth Circuit opinion is directly to the contrary. App. at 10a.

Ability To Pay: *Bunn v. Central Realty,* 592 F.2d 891, 892 (5th Cir. 1979), and *International Soc'y for Krishna v. Collins,* 609 F.2d 151 (5th Cir. 1980) (per curiam), squarely hold for the Fifth Circuit that "a plaintiff's ability to pay is not a 'special circumstance' that would prohibit an award of attorney's fees under § 1988." 609 F.2d at 151. Once more, the Sixth Circuit charted an opposite course in the decision below. App. at 10a.

EIGHTH CIRCUIT: The Eighth and Sixth Circuits disagree on all three questions presented here.

Discretion: *Wharton v. Knefel,* 562 F.2d 550, 557 (8th Cir. 1977), follows the *Newman v. Piggie Park, supra,* standard to award fees ordinarily "'. . . unless special circumstances would render such an award unjust.'" 562 F.2d at 557. *Accord, Int'l Soc'y for Krishna v. Anderson,* 569 F.2d 1027, 1029 (8th Cir. 1978) (per curiam). As shown earlier, the Sixth Circuit in this case departed from that standard. App. at 10a.

Good Faith: The Eighth Circuit in *Hutto v. Finney,* 548 F.2d 740, 742 n.6 (8th Cir. 1977), *aff'd,* 437 U.S. 680 (1978), noted that ". . . in view of the statute, we are not required to pass on the issue of bad faith . . . ." *Accord, Pickett v. Milam,* 579 F.2d 1118, 1121 (8th Cir. 1978). Under the same statute the Sixth Circuit relied on good faith as a basis for denying fees. App. at 10a. A clear conflict is present.

Ability To Pay: *Reproductive Health Services v. Freeman,* ___ F.2d ___ (8th Cir. Jan. 9, 1980) (No. 79-1275) (not yet reported), awards § 1988 fees to two gynecologists and a substantial medical facility. The Sixth Circuit below rejected such an award in its footnote 11. This is a direct conflict in results.

Other Conflicts: It would unduly lengthen this Petition to enumerate all of the circuit conflicts brought on by the decision below. Some of the remainder, however, may be summarized as follows:

Discretion: The Sixth Circuit appears to be virtually alone in not adopting the *Newman v. Piggie Park, supra,* standard. Other appellate decisions to the contrary include *Mid-Hudson Legal Services v. G&U, Inc.,* 578 F.2d 34, 37-38 (2d Cir. 1978); *Ross v. Horn,* 598 F.2d 1312, 1322 (3d Cir. 1979); *Davis v. Murphy,* 587 F.2d 362, 364 (7th Cir. 1978); and *Sethy v. Alameda County Water Dist.,* 602 F.2d 894, 897 (9th Cir. 1979). *But see Zarcone v. Perry,* 581 F.2d 1039 (2d Cir. 1978), *cert. denied,* 439 U.S. 1072 (1979).

Good Faith: Few circuits have explicitly considered "good faith" as a defense to a § 1988 claim. The legislative history[6] and the holding of this Court in *Hutto v. Finney,* 437 U.S. 678, 693-94 (1978), suggest that the question is so thoroughly settled that it is almost never raised.

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[6]Senate Report at 4-5; House Report at 2 & n.1, 7-9.

Ability To Pay: Even assuming that a factual basis existed for burdening Mahoning Women's Center with counsel fees after the long, inevitably expensive delay in opening, the Sixth Circuit is virtually alone in weighing that factor against a prevailing plaintiff. The Third Circuit has observed that § 1988 "contains no test of ability to pay. Nor is there anything in the congressional history which suggests such a limitation." *Hughes v. Repko,* 578 F.2d 483, 488 (3d Cir. 1978). The Third Circuit has also awarded fees to legal services organizations. *Rodriguez v. Taylor,* 569 F.2d 1231, 1245 (3d Cir. 1977). The Seventh Circuit is in accord. *Hairston v. R&R Apartments,* 510 F.2d 1090, 1092 (7th Cir. 1975) (Fair Housing Act case). These decisions suggest a conflict with the Sixth Circuit whenever financing of the litigation is not a consideration.

In sum, three disputed issues in the Sixth Circuit opinion have been decided differently by other courts of appeal. This conflict creates a lack of uniformity in interpretations of a significant Act of Congress. Review by this Court is necessary to restore that uniformity and to preserve the effectiveness of the Act.

III.

THE DECISION OF THE COURT OF APPEALS IS INCONSISTENT WITH HOLDINGS BY THIS COURT INVOLVING ATTORNEYS' FEES IN ANALOGOUS CIVIL RIGHTS AREAS, SUCH AS *NEWMAN v. PIGGIE PARK* AND *NORTHCROSS v. BOARD OF EDUCATION.*

Both this Court and the Congress have endeavored to bring about uniformity in interpreting the many attorney' fees statutes. Senate Report at 2, 6. A carefully developed legislative history makes it clear that

§ 1988 "follows the language of Titles II and VII of the Civil Rights Act of 1964 . . . and section 402 of the Voting Rights Act Amendments of 1975 . . . ." Senate Report at 2.

This Court set the controlling standard of review for Title II fee cases in *Newman v. Piggie Park,* 390 U.S. 400 (1968). A prevailing party "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id.* at 402. The same standard has been consistently adhered to, as in *Northcross v. Board of Education,* 412 U.S. 427, 428 (1973) (per curiam).

The Sixth Circuit opinion does not even acknowledge the *Newman-Northcross* standard. Moreover, it makes no reference to the extensive legislative history that was stressed in *Hutto v. Finney,* 437 U.S. 678, 693-94 (1978).

Hutto appears to discard "good faith" as a defense to a § 1988 claim. 437 U.S. at 693-94, 700. The *Newman-Northcross* limitations on discretion, moreover, appear to require a very different approach and result than that reached by the Sixth Circuit.

Footnote 11 basically disregards the prior decisions of this Court and the legislative history of the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976). It repeals § 1988 for "abortion clinic" cases. To review this serious departure from applicable cases and legislative history, this Court should grant certiorari.

CONCLUSIONS

For the reasons set out, this Court should grant the petition for writ of certiorari, and set this case down for plenary consideration, with briefs on the merits and oral argument.

Respectfully submitted,

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March 14, 1980

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

Nos. 77-3406, 77-3524

Argued April 18, 1979

Decided Dec. 18, 1979

[610 F.2d 456]

MAHONING WOMEN'S CENTER,
Plaintiff-Appellee, Cross-Appellant,

v.

JACK C. HUNTER, Mayor and President of the Board of Health; DONALD BAKER, Chief of Police; RICHARD HUGHEY, HERMAN "PETE" STARKS, PATRICK J. UNGARO, ROBERT G. SPENCER, LEONARD J. YURCHO, MICHAEL J. CROGAN, and JOHN T. MURPHY, City Council Members; DR. SAMUEL GOLDBERG, DOUGLAS K. EVERETT, WARREN HARRELL, JR., MRS. DORIS RINKOV, and MRS. JOYCE KESTER, Board of Health Members,

Defendants-Appellants, Cross-Appellee.

Before ENGEL and MERRITT, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

MERRITT, Circuit Judge.

In *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), the Supreme Court held under the

due process clause that a woman's right to choose an abortion is a protected liberty sufficiently important that a legislative majority may not prohibit it entirely or burden it significantly during the first trimester. The Youngstown city ordinance in question here, as District Judge Lambros concluded,[1] so undermines the effective enjoyment of the rights guaranteed in *Wade* as to render the ordinance invalid. The ordinance imposes a series of costly medical and building code regulations on abortion clinics performing first trimester abortions.

I.

Shortly after Mahoning Women's Center, Inc. leased space in Youngstown, Ohio, for use as a first-trimester abortion clinic, the city council enacted Chapter 98.00 of its Revised Code of Ordinances, entitled "ABORTIONS." Among the multitude of medical and surgical techniques and operations in existence, Youngstown has singled out for extensive regulation only medical clinics performing abortions. It requires abortions after the first trimester to be performed in a hospital licensed as a maternity unit by the Department of Health of the State of Ohio. Its other provisons apply to *all* abortions (i. e., first-trimester abortions) not performed in a hospital regulated by the Department of Health of the State of Ohio, including individual physicians' offices. They prohibit operation of a non-hospital abortion service without a license issued by the Board of Health of the City of Youngstown.

The ordinance recites that its single purpose is to require "the highest standards of health care . . . for the protection of the pregnant woman." To that end, the

[1] *See Mahoning Women's Center v. Hunter*, 444 F.Supp. 12 (N.D.Ohio 1977).

ordinance regulates the location and physical conditions of abortion clinics, qualifications of its staff, the types of services and equipment required, and the procedures to be followed. Some of the requirements do little more than ensure sanitation, orderliness, and the privacy and comfort of patients. Others, taken together, effectively require that all first-trimester abortions be performed in facilities that are the functional equivalent of a hospital. Abortion operations must be supervised by a "diplomate of the American Board of Obstetrics and Gynecology," a "professor of medicine" or other highly qualified "obstetrician," and only obstetricians or surgeons may perform the abortions. Anesthesia may only be administered by an anesthesiologist. Nursing personnel must be supervised and directed by a registered nurse with post-graduate education or experience in obstetric or gynecological nursing. The clinic must have expensive and elaborate equipment: a cardiac defibrillator; an X-ray machine; knee or foot controlled sinks; a clinical laboratory equipped to perform a broad spectrum of required tests; a standard operating room or a written agreement with a hospital located within a total transport time of fifteen minutes for use of a standard operating room.

Other provisions require the pregnant woman's written, informed consent before an abortion can be performed, and establish extensive recordkeeping requirements without insuring confidentiality, including "admission and discharge notes, histories, results of tests and other progress notes of patients," as well as "written verification by one or more physicians of the diagnosis and duration of pregnancy." Finally, the ordinance requires that each abortion service be licensed and provides for evaluation of the facility seeking licensure by the Board of Health with the assistance of a panel of

qualified obstetricians or gynecologists appointed by the Board. Violation of any of its provisions is punishable by fine and imprisonment.

Mahoning Women's Center, Inc. applied for and was denied a license for its facilities. The Center then filed this suit for alleged violations of 42 U.S.C. § 1983 against various city officials and members of the city council, individually and in their official capacities, seeking declaratory and injunctive relief and damages. Plaintiff alleged Chapter 98.00 was violative of constitutional rights of due process and equal protection, and of the fundamental right of women to decide whether to bear a child.[2]

At the trial, the parties presented conflicting testimony of medical experts. The focus of the disagreement among the medical experts was the need for equipment necessary for dealing with major surgical complications. The doctors were in accord, however, as to the need for direct surgical supervision by an obstetrician. The District Court found that Chapter 98.00 "effectively requires any abortion service to be equipped and staffed in such a fashion as to provide facilities equivalent to

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[2]Jurisdiction is premised on 28 U.S.C. § 1331. Plaintiff's financial interest assures its standing to attack the constitutionality of the ordinance. *Singleton v. Whulff*, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976). Additionally, plaintiff demonstrates sufficient stake in the outcome to assert the rights of its patients. *See Friendship Med. Center, Ltd. v. Chicago Bd. of Health*, 505 F.2d 1141 (7th Cir. 1974), *cert. denied sub nom. Chicago Bd. of Health v. Friendship Med. Center, Ltd.*, 420 U.S. 997, 95 S.Ct. 1438, 43 L.Ed.2d 680 (1975); *Mobile Women's Med. Clinic v. Board of Comm'rs*, 426 F.Supp. 331 (S.D.Ala. 1977). *See also Doe v. Bolton*, 410 U.S. 179, 188, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973). We express no view as to the constitutionality of the ordinance as applied to individual medical doctors.

those of hospital surgical wards." The Court further found that, in order for the Center to comply with the ordinance, it must pay for additional equipment and increased salaries. The Center's present fee for services was $175.00, but hospital fees for the same services ranged between $300.00 and $500.00. One medical expert testified that, in his opinion, compliance with the requirements of the ordinance would require the Center to double or triple its fee. The Court found that the surgical procedures utilized by the Center in performing first-trimester abortions were of a minor nature and involved a low percentage of complications. Finally, the District Court found that no hospital in the Youngstown area performed abortions for other than therapeutic purposes.

The District Court concluded that the ordinance disregarded a woman's fundamental right to seek an abortion and the constitutional standards set forth in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). The Court also concluded that it denied equal protection of the law to those physicians who would perform abortions in that the ordinance regulated only those physicians while leaving other comparable medical procedures to the discretion of the attending physician. The District Court declined to sever the constitutional from the unconstitutional provisions of the ordinance and declared it unconstitutional in its entirety.

II.

We recognize and affirm the value our society accords the life of the unborn child. But for two reasons it is not open to us in this case involving first-trimester abortions to weigh the state's interest in preserving the unborn embryo against the mother's right to decide not to bear a child. First, the Supreme Court, after weighing

these interests, has spoken on this issue, holding that the mother's choice during the first trimester is the determining factor. Second, the interest of the unborn embryo is not before us here because the ordinance in question, according to its express terms, is concerned solely with insuring the "highest standards of health care" for the mother. The conflict in question then is solely between the city's interest in the health of the mother and the mother's right to control her reproductive system during the first trimester of pregnancy.

The subject of abortion is now heavily entangled in a public controversy about the right to life of the unborn fetus. This controversy arises from differing views about religion, woman's liberation, social morality, and appropriate lifestyles. In reviewing the ordinance in question here, we put those controversies entirely to one side and look to the holdings and purposes stated in Supreme Court opinions concerning a woman's control over her own reproductive system during the first trimester.

III.

In addition to formulating specific limitations on government in the first eight amendments of the Constitution, the founding fathers in a more general way carved out a slice of human affairs of a private nature which should be "retained by the people" without legislative interference. The ninth amendment provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Under the fourteenth amendment, the federal courts are required to identify and enforce those personal rights which may not be abridged by local legislative majorities. *Roe v. Wade*, 410 U.S. 113, 93 S.Ct 705, 35 L.Ed.2d 147 (1973), identified one

of those rights. It is a "part of a series of decisions allocating to the woman the essentially unfettered choice of whether to bear a child"[3] based on her own needs and moral sense, instead of leaving the choice to legislative majorities, parents or spouses.

Depending on local sentiment, legislative majorities differ on the subject of reproduction. Many have enacted measures requiring birth and prohibiting abortion and a few have required sterilization or otherwise penalized childbirth. The Supreme Court has consistently held that any significant restraint either way on the woman's autonomy is invalid. This general principle has prevailed no matter whether the current legislative majority favors or opposes contraception,[4] sterilization,[5] abortion,[6] delegation of control of the abortion decision to the parents or spouse of the pregnant woman,[7] or measures that penalize the pregnant woman for deciding to bear a child.[8]

Having previously declared the woman's unfettered right to choose to carry the child to term or (with the

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[3]Tribe, *American Constitutional Law* 933 (1978).

[4]*Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (invalidating state prohibition of use of contraceptives by married persons).

[5]*Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) (invalidating state sterilization of convicts).

[6]*Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

[7]*Planned Parenthood v. Danforth*, 428 U.S. 52, 67-75, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976); *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973).

[8]*Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974) (invalidating state restrictions on work by pregnant teachers who decide to have child).

advice of her doctor) to terminate pregnancy during the first trimester, the Supreme Court in *Planned Parenthood v. Danforth,* 428 U.S. 52, 96 S.Ct. 2831, 49 L. Ed.2d 788 (1976) struck down a law which interfered with the effective enjoyment of that right. One of the laws invalidated in *Danforth* required that the abortion procedure employ a particular, medical technique (prostaglandin rather than saline amniocentesis) that, *although preferable from a medical perspective,* was not widely available. The same principle of effective enjoyment applies here.

The Youngstown ordinance likewise is designed to leave in place in an abstract sense the woman's autonomy and choice, her abstract "right" to get an abortion during the first trimester, but the ordinance removes the effective enjoyment of the right by imposing heavy and unnecessary conditions on the performance of the operation. The Supreme Court found in *Wade* on the basis of medical evidence that first-trimester abortions are relatiely simple, uncomplicated operations, as safe or safer than normal childbirth. 410 U.S. at 149, 93 S.Ct. 705. Yet the Youngstown ordinance disqualified an operation supervised by a general practitioner with years of education and practical experience. It even disqualifies an operation supervised by a skilled surgeon who is not an obstetrician. The city may not define the term "physician" to mean more than "a physician currently licensed by the State." *Id.* at 165, 93 S.Ct. at 732. The regulation of first-trimester abortions is constitutionally suspect. The city has not suggested a compelling reason for singling out and imposing such onerous performance restrictions on this particular surgical procedure.

Neither is there a compelling need for the expensive equipment required by the ordinance. A cardiac defib-

rillator starts the heart going again if it should stop. The city does not require such a machine for other much more complicated opeations, and again we see no reason why abortions should be singled out. The city does not require an X-ray machine or a standard operating room at the place where a doctor sets a broken leg or shoulder. It does not require special foot controlled sinks at a place where a doctor amputates an arm. It does not require a clinical laboratory at a place where blood transfusions are given or hormone, insulin or other chemical injections are administered. Only at places performing first-trimester abortions are these conditions imposed.

This ordinance is more subtle than one that requires that all marriages take place in a building with a steeple or that all sexual relations take place in a room wired to detect the use of contraceptive devices. But the ordinance, by imposing costly and unnecessary restrictions, is designed to burden and deny in a similar way the effective enjoyment of a choice reserved to the individual by the Constitution. Its enforcement will return us to the days of illegal back street abortion mills for the poor. Only the middle class and the well-to-do would be able to afford the operation.

Like the District Court, we cannot untangle the constitutional from the unconstitutional provisions of such an ordinance. Its main provisions and purpose are clearly invalid. Although the informed consent provisions may be valid in other contexts,[9] the consent required here necessarily incorporates the woman's consent to performance of the operation according to the other unconstitutionally imposed conditions of the ordinance.

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[9] *Planned Parenthood v. Danforth,* 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976).

Recordkeeping provisions may be valid in other contexts,[10] but this ordinance imposes unconstitutional qualifications and controls on the medical people who are supposed to create, maintain and use the records. In this situation, we do not believe a useful purpose would be served by attempting to rewrite the minor provisions of the ordinance in order to make them constitutional.[11]

Accordingly, the judgment of the District Court is affirmed.

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[10] *Ibid.*

[11] In declining to award attorneys fees to plaintiff, the District Court did not abuse the "discretion" expressly vested in it by 42 U.S.C. §1988 (1976). In ruling upon requests for the award of attorneys fees, the District Court may consider the nature of the question presented, the good faith of the parties, the means of the plaintiff and the quality and extent of the legal services rendered. Weighing these considerations, the Court decided not to make an award of attorneys fees. Plaintiff's do not offer any persuasive reasons for finding that the District Court abused its discretion in this regard.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 76-203 Y

[Filed: Sept. 14, 1977]

MAHONING WOMEN'S CENTER, INC.,
Plaintiff,

v.

JACK C. HUNTER, *et al.*,
Defendants.

ORDER

LAMBROS, District Judge

Plaintiff has moved the Court to award attorney fees and costs against defendants in the above-captioned matter. Plaintiff predicates its right to an allowance of attorney fees on the provisions of the Civil Rights Attorney's Fees Awards Act of 1976, 45 L.W. 165, which provides:

> Section 2. That the Revised Statutes Section 722 (42 U.S.C. 1988) is amended by adding the following:
>
> In any action or proceeding to enforce a provision of Sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 U.S.C. §§ 1981, 1982, 1983, 1985, and 1986], or in any civil action or proceeding, by or on behalf of the United States

of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost.

It appears to the Court that defendants acted in good faith in promulgating Chapter 98.00 of the Revised Code of the City of Youngstown. Such good faith mitigates against the award of attorney fees in this case. Further, plaintiff is not indigent, but rather is a corporation for profit entirely capable of bearing the cost of the prosecution of this action. Accordingly, the Court in its discretion denies plaintiff's motion for attorney fees.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
United States District Judge

Dated: 9/17/77

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 76-203 Y

MAHONING WOMEN'S CENTER,
Plaintiff,

v.

JACK C. HUNTER, *et al.*,
Defendants.

JUDGMENT

LAMBROS, District Judge

In accordance with the foregoing Findings of Fact and Conclusions of Law, judgment is hereby rendered in favor of plaintiff and Chapter 98.00 is hereby declared unconstitutional as applied to first trimester abortions.

The injunctive relief sought by plaintiff is denied at this time, the Court finding such relief to be unnecessary.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
United States District Judge

Dated: 5/25/77

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 76-203 Y

MAHONING WOMEN'S CENTER,
Plaintiff,

v.

JACK C. HUNTER, et al.,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

LAMBROS, District Judge

This is an action challenging the constitutionality of Chapter 98.00, "Abortions", of the Revised Code of Ordinances of the City of Youngstown.[1] Plaintiff seeks declaratory, injunctive and monetary relief pursuant to 28 U.S.C. § 2201 and 42 U.S.C. § 1983. The case has been submitted to the Court for resolution of the constitutional issues[2] upon the pleadings, briefs of counsel, and certain stipulated evidence.[3]

[1] Chapter 98.00 is reproduced in the Appendix to this opinion.

[2] By order of February 15, 1977 the Court severed plaintiff's damage claims for purposes of trial.

[3] On December 1, 1976 the Court conducted a hearing on plaintiff's motion for preliminary injunction. By order of January 3, 1977 the Court deferred ruling on such motion, consolidated the motion with trial on the merits, and ordered counsel to brief four additional issues prior to trial. Counsel having submitted their briefs, the Court finds it need not address issues I and IV as the parties are not in dispute as to these matters. The Court resolves issues II and III in favor of defendants and will proceed to the merits of this case.

The gravamen of this case concerns defendants' right to regulate plaintiff's performance of first trimester abortions. This case is not one of first impression, and the Court is mindful of the national controversy which has resulted from the Supreme Court's decision in *Roe v. Wade,* 410 U.S. 113 (1973). It is a controversy of intense moral and legal convictions which has transcended all segments of our society. However, within the context of this litigation it is neither the function nor the intention of the Court to embroil itself with this controversy or to expound upon these convictions. Rather, the Court must determine upon the evidence presented and the applicable legal precedent whether Chapter 98.00 unconstitutionally abridges plaintiff's right to perform first trimester abortions. In accordance with the findings of fact and conclusions of law set forth below, the Court is compelled to resolve this issue in favor of the plaintiff.

FINDINGS OF FACT

1. Plaintiff is an Ohio corporation established to provide women with first trimester abortions and counseling sevices regarding reproductive health care. Defendants are various officials of the City of Youngstown.[4]

2. In early October, 1976 plaintiff rented facilities in Youngstown, Ohio in anticipation of commencing clinical services.

[4] Upon due consideration, the Court denies the motion to dismiss of defendants Goldberg, Everett, Harrell, Rinkov and Kester.

3. On October 27, 1976, subsequent to plaintiff's obtaining facilities, the Youngstown city council enacted Chapter 98.00, "ABORTIONS", of the Revised Code of Ordinances.

4. Chapter 98.00 purports to regulate all abortions not performed in a hospital licensed or regulated by the Department of Health of the State of Ohio. Chapter 98.00 further provides that no person shall operate or maintain an abortion service without a license issued by the Board of Health of the City of Youngstown. Evaluation of the abortion service seeking licensure is made by the Board of Health, with the assistance of a panel of qualified obstetricians or gynecologists appointed by the Board. The Board may revoke such license for failure to comply with Chapter 98.00. Violation of the provisions of Chapter 98.00 is punishable by fine and imprisonment.

5. Pursuant to the applicable provisions of Chapter 98.00 plaitiff applied for and was denied a license for its facilities.

6. The regulations of Chapter 98.00 are plenary and encompass virtually every facet of operation of any facility providing abortion services. The evidence establishes that Chapter 98.00 effectively requires any abortion service to be equipped and staffed in such a fashion as to provide facilities equivalent to those of hospital surgical wards.

7. In order to comply with the requirements of Chapter 98.00, plaintiff must absorb the expense of additional equipment and increased staff salaries. Plaintiff's estimated equipment costs approach $50,000.00.

Plaintiff's present service fee is $175.00. Hospital fees for the same services range between $300.00 to $500.00.

8. Chapter 98.00 exclusively regulates facilities providing abortion services. The provisions of said Chapter are inapplicable to facilities which render medical services other than abortions. Nor does the City of Youngstown have any other ordinance which regulates the equipment or procedures to be used by doctors in performing other surgical operations which are comparable in degree of medical complexity to abortion operations.

9. There are no hospitals within the Youngstown area which perform abortions for other than therapeutic purposes. Prior to the enactment of Chapter 98.00 at least one physician in Youngstown did perform first trimester abortions in his office at the request of his patients.

10. The expert testimony presented to the Court regarding the nature of the first trimester abortion operation and the potential complications which may result from such surgery is in essence diametrically opposed. Doctors Buckley and Fogarty have testified that abortion procedures constitute major surgery of a unique nature which is susceptible to serious complications. Doctors Kelley and Ellison, however, have testified that abortion procedures constitute minor surgery which is basically uncomplicated and comparable to such other surgery as vasectomy and diagnostic dilatation and curettage. The physicians are in similar disagreement as to the necessity of the requirements imposed by Chapter 98.00 in regard to plaintiff's facilities.[5]

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[5]The doctors' disagreement in this regard focuses upon the need for equipment to deal with major surgical complications. The doctors are in accord as to certain requirements of Chapter 98.00, such as additional recovery facilities and direct surgical supervision by an obstetrician or gynecologist.

11. The Court has extensively reviewed the evidence in this case and finds that the surgical procedures to be utilized by plaintiff, vacumn aspiration and dilatation and curettage,[6] are of a minor nature, involve a low percentage of complications,[7] and do not require regulation of the sort imposed by Chapter 98.00. The abortion operation, and any subjective factors necessarily considered therewith, are well within the exercise of a qualified physician's medical judgment.

CONCLUSIONS OF LAW

1. The Court initially finds that plaintiff has standing to bring this action. See eg., *Friendship Medical Cen., Ltd. v. Chicago Bd. of Health,* 505 F.2d 1141 (7th Cir. 1974); *Mobile Women's Med. Clinic v. Bd. of Com'rs,* 426 F.Supp. 331 (S.D. Ala. 1977); *Planned Parenthood Ass'n v. Fritz,* 401 F.Supp. 554 (E.D.Pa. 1975). Further as the plaintiff is directly exposed to criminal prosecution this case presents a justiciable controversy. See *Friendship Medical Cen., Ltd. v. Chicago Bd. of Health, supra;* cf. *Planned Parenthood Ass'n v. Fritz, supra.*

2. Defendants assert that the Supreme Court in *Roe v. Wade:*

> [D]id not consider any evidence, nor did it address itself to the question of whether or not medical complications that do not result in death are yet serious enough and occur frequently enough to warrant state intervention. * * * Indeed, no other reported case appears to struggle with factual questions of how frequently abortion complications occur and how serious a problem they present."[8]

[6]Vacuum aspiration is by far the most common method of performing first trimester abortions.

[7]For example, defendants' experts have acknowledged that certain complications testified to, such as cardiac arrest and convulsive reactions to anesthesia, are rare. Defendants' experts further acknowledge that any potential complications could occur in a hospital as well as in a doctor's office or plaintiff's clinic.

This premise appears to be erroneous as among the factors considered by the Supreme Court in *Roe v. Wade* was the position of the American Public Health Association:

> It was said that 'a well-equipped hospital' offers more protection 'to cope with unforseen difficulties than an office or clinic without such resources. . . . ' The factor of gestational age is of overriding importance.' Thus, it was recommended that abortions in the second trimester and early abortions in the presence of existing medical complications be performed in hospitals as inpatient procedures.

Further, *Roe v. Wade* must be read in conjunction with its companion case of *Doe v. Bolton,* 410 U.S. 179 (1973),[9] in which the Supreme Court stated:

> This is not to say that Georgia may not or should not, from and after the end of the first trimester, adopt standards for licensing all facilities where abortions may be performed so long as those standards are legitimately related to the objective the State seeks to accomplish. The appellants contend that such a relationship would be lacking even in a lesser requirement that an abortion be performed in a licensed hosptial, as opposed to a facility, such as a clinic, that may be required by the State to possess all the staffing and services necessary to perform an abortion safely (including those adequate to handle serious complications or other emergency, or arrangements with a nearby hospital to provide

[8]Defendants' final brief at 1, 2.

[9]*Roe v. Wade, supra* at 165.

such services). Appellants and various amici have presented us with a mass of data purporting to demonstrate that some facilities other than hospitals are entirely adequate to perform abortions if they possess these qualifications. The State, on the other hand, has not presented persuasive data to show that only hospitals meet its acknowledged interest in insuring the quality of the operation and the full protection of the patient. We feel compelled to agree with appellants that the State must show more than it has in order to prove that only the full resources of a licensed hospital, rather than those of some other appropriately licensed institution, satisfy these health interests.

Finally, cases subsequent to *Roe v. Wade* and *Doe v. Bolton* have addressed the question of "how frequently abortion complications occur and how serious a problem they present." Eg. *Mobile Women's Med. Clinic v. Bd. of Com'rs., supra.*

3. Defendants having failed to distinguish *Roe v. Wade* and its progeny, the Court must adjudge the issues in this case in accordance with such precedents.

4. In *Roe v. Wade* the Supreme Court held that the fundamental right of privacy founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[10] As a fundamental right, regulation of this decision is permissible only if warranted by a compelling state interest.[11]

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[10] *Roe v. Wade, supra* at 153.

[11] *Id.* at 155.

5. The Supreme Court determined that the State's interest becomes compelling at the end of the first trimester. Prior to this point:[12]

> [T]he attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

Subsequent to the first trimester, however:[13]

> [A] State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

6. In *Sendak v. Arnold,* 45 L.W. 3398 (1976), the Supreme Court recently reaffirmed its holding in *Roe v. Wade* by summarily affirming a three-judge district court[14] which struck down an Indiana statute providing:

> Abortion shall in all instances be a criminal act except when performed under the following circumstances:

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[12] *Id.* at 163.

[13] *Id.* at 163.

[14] The district court opinion is reported at 416 F. Supp. 22 (S.D. Indiana 1976).

(a) During the first trimester of pregnancy for reasons based upon the professional, medical judgment of the pregnant woman's physician provided:

(1) It is performed by such physician in a hospital or a licensed health facility as defined in IC 1971, 16-10-2 which offers the basic safeguards as provided by a hospital admission and has immediate hospital backup. . . .

In holding this statute unconstitutional the district court expressly relied on the above quoted portions of *Roe v. Wade.* Although affirmance was by summary order, such affirmance is binding on this Court. Eg. *Sen. Cit. Clubs of Winston-Salem v. Duke Power Co.*, 425 F.Supp. 411 (W.D.N.C. 1976).

7. The mandate of the Supreme Court has been further clarified by such decisions as *Friendship Medical Center Ltd. v. Chicago Board of Health*, 505 F.2d 1141 (7th Cir. 1974), *Word v. Poelker*, 495 F.2d 1349 (8th Cir. 1974), and *Mobile Women's Med. Clinic v. Bd. of Com'rs, supra*, which have held ordinances almost identical to Chapter 98.00 to be unconstitutional.

8. Defendants assert that current cases demonstrate that first trimester abortion requirements may be adopted. To the extent such requirements do not impair the abortion decision and do not treat abortion operations differently from other comparable surgical procedures, the defendants are correct.[15] Eg. *Planned*

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[15]Defendants have principally relied upon *Hodgson v. Lawson*, 540 F.2d 1350 (8th Cir. 1976), as authority for the imposition of abortion regulations to ensure maximum patient safety. The Court notes, however, that upon remand the district court expressly disagreed with the 8th Circuit position in light of the recent decision in *Arnold v. Sendak, supra.* See *Hodgson v. Lawson*, No. 4-74-155 (D. Minn. March 7, 1977).

Parenthood of Missouri v. Danforth, — U.S. —, 49 L.Ed. 2d 788; *Wolfe v. Schroering*, 541 F.2d 523 (6th Cir. 1976); *Abortion Coalition v. Mich. Dept. of Public Health*, 426 F.Supp. 471 (E.D. Mich. 1977); *Mobile Women's Med. Clinic v. Bd. of Com'rs, supra.*

However, Chapter 98.00 presents sweeping regulations which disregard the fundamental rights involved and the comensurate restrictions on state action. Such sweeping regulation will not withstand constitutional scrutiny. Eg. *Word v. Poelker, supra.*

9. In view of established precedent, it is clear that Chapter 98.00 attempts to regulate first trimester abortions in a constitutionally impermissible manner. Nor will the Court dissect Chapter 98.00 in order to carve out a constitutionally acceptable ordinance. It is not the Court's function to legislate by judicial decree. The enactment of legislation which complies with the requirements of the Supreme Court is left to the city council of Youngstown.

10. The Court further finds Chapter 98.00 to be unconstitutional in that it denies equal protection of the law to those physicians who would perform abortions. Where fundamental rights are involved, a compelling interest is required in order to differentiate in treatment between two classes which do not differ on grounds related to the purpose of the challenged ordinance. Eg. *Friendship Medical Cen., LTD v. Chicago Bd. of Health, supra; Word v. Poelker, supra.* Although the purpose of Chapter 98.00 is to effectuate "the highest standards of health care," such ordinance regulates only those physicians who would perform abortions while leaving other comparable medical procedures to the discretion of the attending physician. Thus, Chapter 98.00 differentiates between medical procedures which are

without distinction as to surgical risk in a fashion which adversely affects the exercise of fundamental rights. Defendants have failed to demonstrate such a compelling interest as to warrant this regulation.

11. The Court having found Chapter 98.00 to violate the constitutional standards set forth in *Roe v. Wade* and equal protection of the laws, declines to issue the injunctive relief sought by plaintiff. The Court is confident that the defendants will abide by the Court's order and therefore find injunctive relief to be unnecessary at this time.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
United States District Judge

Dated: 5/25/77

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. **79-1435**

Mahoning Women's Center,

Petitioner,

v.

Jack C. Hunter, Mayor and President of the Board of Health; Donald Baker, Chief of Police; Richard Hughey, Herman "Pete" Starks, Patrick J. Ungaro, Robert G. Spencer, Leonard J. Yurcho, Michael J. Crogan, and John T. Murphy, City Council Members; Dr. Samual Goldberg, Douglas K. Everett, Warren Harrell, Jr., Mrs. Doris Rinkov, and Mrs. Joyce Kester, Board of Health Members,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari to review the December 18,1979 final judgment of the Court of Appeals denying litigation costs and council fees in a 42 U.S.C. § 1983 action where the Mahoning Women's Center prevailed on the merits.

QUESTIONS PRESENTED

I. Whether the Court of Appeals abused the discretion under 42. U.S.C. §1988 by not allowing a Civil Rights Plaintiff who successfully challenges a city ordinance unconstitutionally restricting first trimester abortion to recover litigation costs?

II. Whether the Court of Appeals applied an erroneous legal standard in its finding of "special circumstances" that would render a 1988 award unjust?

STATEMENT OF THE CASE

The Center is an Ohio Corporation which proposed to open a low cost medical facility in Youngstown, Ohio to provide women with first trimester abortions and counseling services regarding reproductive health care. The Center leased facilities in October, 1976 to effectuate said planned operations.

Subsequent to the opening of the facility by the Center, the Respondents enacted Chapter 98.00, "ABORTIONS", of the Revised Code of Ordinances. This Chapter attemps to regulate all abortions not performed in a licensed hospital or regulated by the Department of Health of the State of Ohio. No facility could operate or maintain this abortion service without a license issued by the Board of Heath of the City of Youngstown. The Center applied for a license which was denied.

The ordinance would prohibit the performance of a non-hospital abortion without a license issued by the Board of Heath of the City of Youngstown. This provision would apply to all abortions.

The effect of the ordinance was to have an abortion take place in a setting which was equal to that of a surgical unit of a hospital including both the staffs and the equipment required. As stated in Chapter 98.00, the purpose of the ordinance was to require "the highest standards of health care . . . for the protection of the pregnant woman." App. 2a. The provisions of the ordinance requiring the extensive medical facilities and a highly qualified staff was designated exclusively for a facility providing abortion services.

Having applied and been denied a license, the Center filed suit against the City. Medical testimony was provided by both parties at trial, the testimony being directly onflicting regarding the gravity of

the surgery to be performed. Likewise, the testimony was also directly conflicting regarding the qualifications of the staff required to perform said abortions and the complexity and the amounts of the equipment necessary to perform such services.

The Court found that the performance of first-trimester abortions were of a minor nature considering the surgical procedures which the Center would be utilizing in performing said abortions. Following the standards set forth in Roe v. Wade, 410 U.S. 113 (1973) the District Court concluded that Chapter 98.00 is an unconstitutional restriction of the right of the Center to perform first trimester abortions.

The Center then moved the District Court for an award of attorneys fees citing the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C.§ 1988 which gives the Court the discretionary authority to award fees as costs for the litigation of the within cause. The request of the Center was denied by the Court and subsequently affirmed by the Sixth Circuit Court of Appeals.

The Center has subsequently submitted a Petition for Writ of Certiorari.

REASONS FOR DENIAL OF WRIT

The decision below should not be reviewed by this Court for two reasons.

First, the trial Court is given disretionary authority to award attorneys fees under 42 U.S.C.§ 1988. The appellants have not established from the record that the Court has in any way abused that discretionary authority. Secondly, the thought process of the District Court and the Sixth Circuit Court of Appeals is consistent with the conclusions of this Court in its decisions regarding attorneys fees.

I. THE CIVIL RIGHTS ATTORNEYS FEES AWARDS ACT OF 1976, 42 U.S.C.§ 1988 GIVES THE COURT DISCRETIONARY AUTHORITY IN AWARDING ATTORNEYS FEES WHICH SHOULD NOT BE REVERSED ABSENT AN ILLUSTRATION OF ABUSE OF THAT DISCRETION.

While the Petitioners go to great lengths to assert that the legislative intent compels an award of attorneys fees, the respondent would submit that the very statute upon which the authority relies does not make the award of attorneys fees mandatory. The relevant part of Section 1988 states that

> "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys fees as part of the cost." (Emphasis added).

Had the Senate and the Congress been of the mind that every prevailing party in litigation of this nature should be entitled to attorneys fees, the language of the Act would have certainly been more definitive.

Neither the Senate nor the House reports are inconsistent with the approach used by the Sixth Circuit as purported by the appellants. S. Rep. No. 94-1011, 94th Cong., 2d Sees. (1976) and H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. (1976). Both reports state that the standard for discretion formed by this Court is Newman v. Piggie Park, 390 U.S. 400, (1968), and Northcross v. Board of Education, 412 U.S. 427. (1973) (per curiam). The decision by the Sixth Circuit in the within cause and the Congressional intent are not inconsistent in view of Newman and Northcross.

The District Court in Naprstak v. City of Norwich, 433 F. Supp. 1369, 1370 concluded that

> "we do not think, however, that attorneys fees must be awarded in all civil rights actions . . . Indeed Congress specifically considered and rejected the option of providing mandatory award of attorneys fees in civil rights actions, wisely leaving such awards in the Court's discretion, to be exercised as each case warrants. See House report at 5-6."

Absent a showing of the abuse of discretion by the Sixth Circuit Court of Appeals and the District Court at the trial level, a determination that attorneys fees should not be awarded is not inconsistent with Section 1988 as enacted by Congress.

II. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH HOLDINGS BY THIS COURT INVOLVING ATTORNEYS FEES IN AN ANALOGOUS CIVIL RIGHTS AREAS, SUCH AS NEWMAN V. PIGGIE PARK, NORTHCROSS V. BOARD OF EDUCATION, AND HUTTO V. FINNEY.

NEWMAN V. PIGGIE PARK. The decision by this Court in Newman does not appear to set forth the conclusions to which the Appellants have alluded. This Court concluded that a prevailing party "Should ordinarily recover an attorneys fee unless special circumstances would render such an award unjust." Newman v. Piggie Park, 309 U.S. 400, 402. This Court then went on to say that the Court did not perceive that any special circumstances existed in Newman which would substantiate the discretion not to award attorneys fees.

This Court does not appear to rule out the good faith of the parties as a criteria in the determination of the award of attorneys fees. This Court does not say that it is no longer necessary to show that one of the litigants "deliberately advance arguments they note to be untenable". Newman at 402.

In its discussion of finding special circumstances in the Newman case which this Court could use in its discretion as to why attorneys fees could not be awarded, this Court, in Footnote 5 in Newman at 402 discussed that this was not even a "borderline case". In an apparent attempt to discuss the frivolous nature of the de-

fense used by the litigants against whom the attorneys fees award was made.

This certainly appears to be an intention by this Court to use the good faith of the defendants at least as a contributing factor in the determination of award of attorneys fees.

NORTHCROSS V. BOARD OF EDUCATION. The issue of attorneys fees resolved in Northcross by this Court was concluded at a time prior to the enactment by Congress of the Civil Rights Attorneys Fees Awards Act of 1976. This Court concluded that Newman was to be the standard upon which attorneys fees should be awarded.

In Footnote 2 of Northcross at 429, this Court paid note that the decision of the issue of attorneys fees was not made in this case absent the clear statutory language permitting such award.

HUTTO V. FINNEY. The award of attorneys fees was deemed by this Court to be

> "adequately supported by the Court's finding that the officials had acted in bad faith in not curing constitutional violations identified earlier." Hutto v. Finney 437 U.S. 678, 689.

It seems apparent from this, and by the Court that the good faith of the litigant is certainly a viable issued in the

in the determination of attorneys fees in civil rights litigation.

This Court went on to say that the

> "District Courts award is adequately supported by its findings of bad faith and that the Act supports the additional award by the Court of Appeals." Hutto at 689.

In this decision, this Court appears to continually discuss the merits of the case as regard to the activities of the litigants in showing their bad faith as a reason for allowing said award. This Court even went as far as to speak of the awarding of the costs including attorneys fees as a "remedial fine". Hutto at 691. In even stronger language it was asserted that

> "we see no reason to distinguish this award from any other penalty imposed to enforce a prospective injuntion." Hutto at 691-692.

The discussion of the circumstances of good faith of the litigants appears to indicate that the good faith or bad faith of the litigants would certainly be a circumstance which would mitigate the awarding of attorneys fees. Since the decision of the Sixth Circuit Court of Appeals evidences a decisional approach which is consistent with the apparent thought process

by this Court in its decisions regarding attorneys fees, the Petition for the Writ of Certiorari by the petitioners should be denied.

Respectfully submitted,

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